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OFFICE OF PETITIONS

In re Application of :
Sinha :
Application No. 09/652,376 :
Filed: 31 August, 2000 :
Attorney Docket No. U012930-9 :
:

DECISION ON PETITION

This is a decision on the petition filed on 25 September, 2003, to revive the instant application under 37 C.F.R. §1.137(a) as abandoned due to unavoidable delay.

The petition under 37 C.F.R. §1.137(a) is **GRANTED**.

BACKGROUND

The record indicates that:

- Petitioner failed to reply timely and properly to the final Office action mailed on 14 February, 2003, with the reply due absent an extension of time on or before 14 May, 2003;
- the application was deemed abandoned after midnight 14 May, 2003;
- Notice of Abandonment was mailed on 3 October, 2003;
- accompanying the instant petition over the signature of Janet I Cord (Reg. No. 33,778) (Petitioner) are *inter alia*: a declaration of Ms. Cord as to her activities in preparing the response (Notice of Appeal with fee and request and fee for extension of time) the power-outage events of the maximum-extension statutory due date of 14 August, 2003; the

action of the Office in response to closure of US Postal Service facilities in response to the outage; copies of the Notice of Appeal with fee authorization and the request and fee authorization for a three- (3-) month extension of time. (All fees have been charged as authorized.)

STATUTES, REGULATIONS AND ANALYSIS

Congress has authorized the Commissioner to "revive an application if the delay is shown to the satisfaction of the Commissioner to have been "unavoidable." 35 U.S.C. §133 (1994).¹

The regulations at 37 C.F.R. §1.137(a) and (b) set forth the requirements for a petitioner to revive a previously unavoidably or unintentionally, respectively, abandoned application under this congressional grant of authority. The language of 35 U.S.C. §133 and 37 C.F.R. §1.137(a) is clear, unambiguous, and without qualification: the delay in tendering the reply to the outstanding Office action, as well as filing the first petition seeking revival, must have been unavoidable for the reply now to be accepted on petition.²

Delays in responding properly raise the question whether delays are unavoidable.³ Where there is a question whether the delay was unavoidable, Petitioners must meet the burden of establishing that the delay was unavoidable within the meaning of 35 U.S.C. §133 and 37 C.F.R. §1.137(a).⁴ And the Petitioner must be diligent in attending to the matter.⁵ Failure to do so does not constitute the care required under Pratt, and so cannot satisfy the test for diligence and due care.

(By contrast, unintentional delays are those that do not satisfy the very strict statutory and regulatory requirements of unavoidable delay, and also, by definition, are not intentional.⁶)

¹ 35 U.S.C. §133 provides:

35 U.S.C. §133 Time for prosecuting application.

Upon failure of the applicant to prosecute the application within six months after any action therein, of which notice has been given or mailed to the applicant, or within such shorter time, not less than thirty days, as fixed by the Commissioner in such action, the application shall be regarded as abandoned by the parties thereto, unless it be shown to the satisfaction of the Commissioner that such delay was unavoidable.

² Therefore, by example, an unavoidable delay in the payment of the Filing Fee might occur if a reply is shipped by the US Postal Service, but due to catastrophic accident, the delivery is not made.

³ See: *Changes to Patent Practice and Procedure; Final Rule Notice*, 62 Fed. Reg. at 53158-59 (October 10, 1997), 1203 Off. Gaz. Pat. Office at 86-87 (October 21, 1997).

⁴ See: In re Application of G, 11 USPQ2d 1378, 1380 (Comm'r Pats. 1989).

⁵ See: Diligence in Filing Petitions to Revive and Petitions to Withdraw the Holding of Abandonment, 1124 Off. Gaz. Pat. Office 33 (March 19, 1991). It was and is Petitioner's burden to exercise diligence in seeking either to have the holding of abandonment withdrawn or the application revived. See 1124 Off. Gaz. Pat. Office *supra*.

⁶ Therefore, by example, an unintentional delay in the reply might occur if the reply and transmittal form are to be prepared for shipment by the US Postal Service, but other pressing matters distract one's attention and the mail is not timely deposited for shipment.

Allegation as to
Unavoidable Delay

Petitioner's showing supports the allegation of unavoidable delay.

CONCLUSION

Accordingly, Petitioner satisfied the "fee," "showing" and "reply" requirement under the regulation, and the petition under 37 C.F.R. §1.137(a) hereby is **granted**.

Petitioner's brief, compliant with the regulations at 37 C.F.R. §1.192, is due within two (2) months of the date of this decision.

The instant application is forwarded to Technology Center 1600 to await the filing of Petitioner's Brief (with fee) on appeal.

Telephone inquiries concerning this decision may be directed to the undersigned at (703) 305-9199.



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Office of Petitions